

DECISION RE; ELLIOTT v EPP CENTRES INCORP. ET AL
PRELIMINARY MATTERS
FEBRUARY 2, 1993

During the conference call of September 18, 1992 counsel for the respondent indicated to me that there were some matters that would be argued as preliminary motions regarding the dispute before me. I indicated to all counsel that I would deal with these matters by way of written submissions and that I would make the rulings required at the beginning of the hearing into this matter. A schedule was set up for exchange of legal arguments between counsel and it was adhered to. I will now make the rulings on the issues raised by the respondent.

JURISDICTION

The respondent challenges my jurisdiction to hold this inquiry based on three arguments. Firstly he suggests that this matter could be dealt with under the Ontario Municipal Act and therefor under section 34(1)(a) of the Human Rights Code discretion should be exercised to allow the matter to be heard by another body. Section 34 (1)(a) reads: "Where it appears to the commission that, (a) the complaint is one that could or should be more appropriately dealt with under an Act other than this act,".... the commission may, in its discretion, decide to not deal with the complaint." Leaving aside the issue of whether this matter could or should be heard under another act the plain reading of this section gives the discretion to the Commission and not to the Board of Inquiry. It is possible that counsel may wish to argue as part of his defense that his client was not under compulsion to set aside a designated area for handicap parking because of the failure of the town of Niagara-on-the-Lake to act under the Municipal Act but it is clear to me that this argument does not deprive me of the Jurisdiction to hold hearing when the Minister has acted to appoint me to do so.

On a similar vein respondent makes as his third argument that under the same section of the Code at subsection(d) a limitation period is established and that the present complaint falls outside that limitation period. The subsection reads: "Where it appears to the Commission that the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay, the Commission may, in its discretion, decide to not deal with the complaint." Again leaving aside the issue of whether or not there was delay, if there was, whether it was in good faith, and if there would be substantial prejudice in allowing a hearing I again point out that this is a matter to be dealt with by the commission not by a Board of Inquiry.

Respondent's second argument, which I am dealing with last is that it is the Planning Act that gives the municipalities the jurisdiction to pass by-laws regarding parking regulation both to set up regulated parking and to enforce such provisions as the municipality sees fit to provide. He argues that the requirement of handicapped parking spaces, because they are larger than regular spaces, may create conflict with existing by-laws. He goes on to argue that the regulations made under the Municipal Act shall not be deemed a breach of the zoning by-law and there is no provision for a similar over ride of power in the Human Rights Code.

If I may re-phase this argument counsel appears to saying that a municipality has the right to pass by-laws regarding parking under the jurisdiction given to them by the Planning Act. Having passed such by-laws, that also may affect private businesses certain requirements may be established for a particular number of spaces per building (for example). Under the Municipal Act a municipality may pass parking regulations specifically with regards to handicapped parking. Because such spaces are larger this may have the overall affect of reducing the number of parking spaces and thereby by complying with the Municipal Act a merchant, for example, could find himself in non-compliance with the by-law passed under the Planning Act. This "catch 22" is dealt with in the Municipal Act by a provision in the Act under section 210, paragraph 153 that in effect says if you have reduced the number of spaces required under the Planning Act by-law to be in compliance with the Municipal Act by-law you shall be deemed to be in compliance with both. Here I must say that I am relying on counsel's interpretation as he did not actually site the section that creates primacy of the one act over the other. Be that as it may the point he makes is that there is no such provision in the Human Rights Code. This envisions a situation wherein a Board may order that a parking place be provided that would then place a person in trouble with another body of government.

It may be true that in highly beaurcracitsed society's such as ours there may arise situations where it appears that the left hand does not know what the right hand is doing however I am not convinced that this is the case here.

In the first place until it is established that the requirement of such a space, should it be order would in fact place the respondent in such a position the argument is moot. Respondent counsel did not argue that such a requirement would have that affect; he merely agreed that it may. Secondly it should be remembered that the Human Rights Code is remedial legislation and therefore it is envisioned that orders made under the Code will have the affect of changing the existing order. If the society did not need to be so changed there would be no need for the Code. If the Code does not have the authority to institute the change that it envisions then there would be little point in the Code being passed in the first place. This, it seems to me was dealt with by section 47(2) of the Code: "Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this act." Therefore if a Board orders that a

handicapped parking space is required by a business in order for that business to be in compliance with Part I of the Code it would over ride a municipal by-law that has the effect of requiring the business to provide parking spaces that do not allow access to the business by persons requiring the use of mechanical assistance for mobility purposes.

In light of the forgoing I find that I do have jurisdiction to hear the matters set before me.

DELAY

Counsel for the respondent also made a motion that I dismiss these complaints against his clients because of the delay in bringing these matters forward. Here he made his argument under two heads: (i) The Charter of Rights and Freedoms and (ii) delay as an abuse of process. I will deal briefly with each.

CHARTER

Section 11: This section applies to persons charged with an offence and the nature of a Human Rights inquiry is civil not criminal. The Board's decision is based on findings made on the civil standard of "balance of probabilities". The Board has no jurisdiction to punish. There is no finding of guilt; indeed there is no requirement that intent be made out to find that there was discrimination. The Board, like a civil court, may order damages be paid. Therefore section 11 does apply to matters arising under the Ontario Human Rights Code.

Section 7: This section protects people in our society from being deprived of life, liberty and security of person except in accordance with natural justice. It has been used to successfully argue that undue delay in a trial process is contrary to this section.

Four Ontario boards of Inquiry recently have determined that section 7 of the Charter does not apply to remedial proceedings under the Human Rights Code.

Hall v. A-1 Collision and Latif (unreported, August 28, 1992, Dawson)

Persad v. Sudbury Regional Police Department (unreported, July 31, 1992, Friedland)

Munsch v. York Condominium Corporation no. 60 (unreported, July 2, 1992 Cumming and Omatsu)

In the Hall decision Professor Dawson specifically looks at the Kodellas decision on which counsel for the respondent relies heavily. She says

"In their emphasis on the type of accusation and their de-emphasis on the penal context of a proceeding or consequence, the judges in Kodellas departed from the more established

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understanding that section 7 rights arise in light of either the possible consequences of a proceeding to an individual, or the nature of the proceedings. Kodellas appears to craft a third route into section 7 of the Charter which focuses on the subject matter of the allegations and "whether the kind of misconduct in question is such that its allegation would cause a normally sensitive person accused of it to suffer from the kind of distress the court of Appeal described" such that, if the process is unreasonably prolonged, section 7, is infringed." (page 18)

Mr. Kodellas was being brought before a Board of inquiry because of allegations of sexual harassment. In our case the complaint is that the respondent did not provide handicap parking. It is clear to me that although both allegations are a breach of the Code allegations of sexual harassment may well carry some degree of stigmatization in the community; I would be hard pressed to be convinced that such would be the case with regard to a parking issue. In my opinion, the nature of the allegations is not sufficient to bring the respondent within the life, liberty or security interests protected by the Charter.

ABUSE OF PROCESS

The final protest made by respondent counsel is that this matter should not proceed due to delay because to do so would be an abuse of process. Respondent counsel cites two cases in this regard: Douglas and Jonlee Holdings Ltd. v. Saskatchewan Human Rights Commission, Marcotte and Hymes, (1990) 1 S.W.R. p. 455 and Harvey v. The Law Society of Upper Canada (unreported). In addition Kodellas is again referred to. In all of these cases facts were in dispute and the delay had the potential of making a fair hearing impossible because of failure of witnesses to remember or even to be found. This is not the situation before me. The facts in this case have never been in dispute. They are very straightforward in nature and easily proven. Counsel does not argue that he will have any difficulty in presenting his case because of delay he merely argues that there has been delay and it is not his client's fault. This is not sufficient to establish "abuse of process."

I do not dispute that under the Statutory Powers and Procedure Act I would have the jurisdiction to dismiss a complaint for reasons of delay if I found that such a delay would create an abuse of process of this board. In Gohm v. Domtar Inc. (Can. Human Rights Reporter 10, 1989) and several other cases following it the boards cite with approval Hyman v. Southam Murray Printing Ltd.

"...while unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy...or in weighing the persuasive force or credibility of testimony or evidence, delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before the board of inquiry unless

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it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned, by order of the Minister ..., a statutorily defined task of undertaking an inquiry ...the board should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfilment of its task impossible."

In this case, although there has been some considerable passage of time it has not made my task impossible to fulfil. The facts are not in dispute nor is there any suggestion that required witnesses are unavailable or that the passage of time has hindered their ability to give adequate testimony to make findings required by this board.

Therefore the hearing will go forward.

PROPER PARTIES

Respondent counsel requests that the complaints against Harry Epp personally be dismissed. It must be assumed that Mr. Epp is the principal officer of the corporation which the subject of the complaint. As such he is properly before the Board.

